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IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

No. 259.

CITIES SERVICE OIL COMPANY,

Petitioner,

against

PARK STEAMSHIP COMPANY, LTD.

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

States Marine Corporation, United States Navigation Company, International Freighting Corporation and Flota Mercante Grancolombiana, S. A., respectfully move this Court, pursuant to Rule 27, Paragraph 9, for leave to file a brief as *amici curiae* in support of the petition for *certiorari* filed August 20th, 1951. The petitioner has consented to the filing of such brief but respondent refused its consent.

The interest of the proposed *amici curiae* is that all or a considerable part of their business involves the chartering of vessels under charters containing so-called "Safe Berth Clauses" similar to that here involved. Thus the decision below seriously affects them and, it is believed, the whole of the maritime industry engaged in the chartering trade or shipping goods under charter.

The *amici curiae* seek through the filing of a brief to emphasize the importance of the question here involved and point out additional reasons why it should be reviewed.

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The Question Presented.

The question is whether a charterer having no control over the operation or navigation of a vessel is to be held responsible to the vessel owner for damage to the vessel caused by the acts, in this case the negligence, of a pilot employed by the owner in improperly anchoring the vessel in an anchorage designated by the charterer in which there admittedly was ample safe anchoring ground. The court below, reversing the District Court, has so construed the so-called "Safe Berth Clause" in question as to render the charterer liable for the improper selection by the owner's pilot of the precise spot within the anchorage at which to drop anchor. In doing so the court shifted the responsibility of a shipowner for the navigation of a vessel to the charterer.

The Facts.

As is customary under all voyage and time charters, the charterer designated the location at which the vessel was to discharge her cargo. In the present instance the charterer designated the Hingham Bay Anchorage in Boston Harbor for discharge into lighters. The vessel owner employed a pilot to take the vessel to this anchorage. Admittedly Hingham Bay contains about half a square mile of safe anchoring ground but around this area there are some shallow waters. However, on two successive occasions the pilot employed by the shipowner selected a spot at which to drop anchor dangerously close to shallow water and shoals. On both occasions the vessel touched bottom. In January 1946, the second occasion, the vessel grounded on an uncharted rock at a spot where the charts indicated

the presence of shoal areas and sustained the damage sued for.

No one challenges the finding of the district judge that:

> "A pilot, exercising reasonable care, could have anchored the *Clearwater Park* in Hingham Bay without exposing it to the danger of shallow waters or shoal areas."

In view of the above finding there would appear to be no doubt that the charterer had complied with the charter requirements, which provided:

> "The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer * * *".

The Importance of the Question.

It is submitted that the duty of a charterer under the usual "Safe Berth Clause" such as that here involved is merely to designate an anchorage in which the vessel can be safely anchored, unless, of course, discharge is to be at a berth alongside a dock. Such we believe has always been the understanding and practice in the chartering trade generally.

When it is considered that under charters such as this the shipowner has the obligation to perform all matters in connection with the operation and navigation of the vessel, it does violence to the obvious and basic intent of the parties to put on the charterer responsibility for any part

of the ship's operation or navigation as the court below has done.

In the case of a charter, other than a demise, it has always been understood that matters of operation and navigation were the duties of the owner. This court, in *New Orleans, etc.* v. *U. S.*, 239 U. S. 202, said at page 206:

> "* * * We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person. * * *"

Again, in *U. S.* v. *Shea*, 152 U. S. 178, p. 187, this court, quoted from its decision in *Leavy* v. *U. S.*, 14 Wall. 607, as follows:

> "* * * All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer."

In *Bramble et al.* v. *Culmer, et al.*, 78 Fed. 497, the Circuit Court of Appeals for the Fourth Circuit said at page 503:

> "The result of all the cases seems to be this: Wherever the shipowner undertakes to act as carrier of goods, and appoints the master and crew, the responsibility for her safe navigation rests upon

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him; but wherever the ship is completely transferred to the hirer for a period of time, and the shipowner has nothing whatever to do with the appointment of her officers and crew, then the charterer becomes responsible for her navigation. No case has been cited, and our researches have not disclosed any, where the mere appointment of a pilot has been held to operate so as to change legal ownership and responsibility. The pilot is considered as the servant or agent of the owner. The fact that he was selected and paid by the charterers cannot alter his relations to the ship."

Thus it appears that the decision of the court below in the respect indicated is in conflict not only with the general line of authorities, but decisions of this Court and the courts of appeals of other circuits.

Anchoring a vessel in a designated area certainly is an act performed in the navigation of the vessel. Thus, if the charterer's right to say where the vessel shall discharge carries with it the duty to pin-point the spot in a given anchorage in which a vessel must drop her anchor, the owner has surrendered control of the vessel for the time being, contrary to the underlying intent of all charters of this kind and the express provision in this charter that: "Nothing herein stated is to be construed as a demise charter of the vessel."

Like most anchorages the one in question was open to the public. In such anchorages the available spots for anchoring depend on the presence or absence of other vessels when a vessel is ready to anchor. However, under the holding of the court below, a charterer, who must give its instructions in advance of the vessel's arrival, must somehow foresee what vessels will be present in the anchorage

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and where each will be. Otherwise the charterer must put a navigator on board to determine the exact spot at the moment the vessel reaches the anchorage or, in effect, borrow the shipowner's pilot or ship's officers for that purpose.

The decision of the court below is, we submit, wholly unrealistic and will cause confusion in the chartering trade and will put unexpected and serious burdens not only on charterers but also on merchants and the government in shipping bulk cargoes on charter party terms, a common method of shipping.

From earliest times, for sound economic reasons, shipowners have been protected against disastrous results which would often follow error in navigation by the limitation of liability laws of this and most maritime nations. But our Limitation of Liability Statutes (46 U. S. Code, Sec. 182 seq.) give the benefit of limitation only to shipowners and demise charterers, that is, charterers who actually man, victual and navigate vessels. Therefore, the putting of responsibility for the navigation and operation of a vessel on a time or voyage charterer, even for a brief period, could be ruinous to the charterer if a serious disaster ensued.

If the decision of the court below be carried to its logical extreme, not only a pilot, but the ship's officers and crew would be considered the borrowed servants of the charterer in anchoring in an anchorage or other location designated by a charterer. Indeed, it may lead to many extremes. What if the navigator overshoots the anchoring spot? Is he still the charterer's servant as he navigates around the bay to again come into the anchorage? What if the charterer designates a berth alongside a dock but the navigator negligently collides with the dock? Where is the line to

be drawn between activities of the pilot, master or navigator as servant of the owner and as servant of the charterer? These considerations emphasize the danger of tampering with the established law and practice that the navigation of the vessel at all times remains with the owner, and the importance to the trade that this court review the decision below which lays open to question the hitherto well settled delineation of the obligations as between owner and charterer with respect to navigation and operation of the vessel.

Indeed, the decision of the court below, if given its logical implications, would apply the borrowed servant doctrine to impose upon a contractor liability for the negligence of servants of the other party to a contract in obeying general and proper instructions which the contractor was entitled to give and which it was the right and duty of the other party to the contract to perform with servants entirely under his control. The implications of such a doctrine are startling. For instance, in the case of government construction contracts the government's officers usually have the right to give general directions to contractors. Can it be that such right imposes a liability on the government for damage due to the negligence of the contractor's servants in performing government orders which were quite capable of being performed without damage if due care had been used?

It is not an answer to these serious consequences to say that charterers can require changes in the clause or may insure the risks of such consequences. It is common knowledge that often time charters are for a period of years and not subject to early change. Indeed such clauses are in standard forms in the hands of ship brokers, shipowners and charterers all over the world and may not be easily changed. Furthermore, the charter here contained an

express provision that nothing in it should be construed as a "demise" of the vessel. What more can be provided by changing the language of the charter?

Similar clauses are not only found in the great majority of charters but also in standard forms prepared by and in use by the government as charterer. Several such clauses are noted in an appendix hereto.

As to insurance, it is obvious that the costs to the charterer would far exceed the costs to an owner whose liabilities may be limited under existing limitation of liability statutes. Indeed, the new and unlimited risks of liability which the decision below puts on charterers may well render insurance costs prohibitive.

It is submitted the decision of the court below puts heavy, new and unintended burdens on charterers including the United States Government and will result in confusion in the chartering trade and beget litigation. It is therefore of utmost importance that it be reviewed by this Court.

Wherefore, the movants respectfully pray that they be permitted to file a brief as *amici curiae* in support of the petition for *certiorari*.

Dated, New York, N. Y., August 31st, 1951.

Respectfully submitted,

L. DEGROVE POTTER,
Counsel for States Marine Corporation, United States Navigation Company, International Freighting Corporation and Flota Mercante Grancolombiana, S. A.

WALTER P. HICKEY,
of Counsel.

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PARK STEAMSHIP COMPANY, LTD.

Respondent.

CONSENT OF PETITIONER.

The petitioner hereby consents to the filing of a brief as *amici curiae* by States Marine Corporation, United States Navigation Company, International Freighting Corporation and Flota Mercante Grancolombiana, S. A.

BARENT TEN EYCK,
Counsel for Petitioner.

Dated, New York, August 31, 1951.

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APPENDIX

List of "Safe Berth" Clauses in Certain Other Forms of Charters

1. Probably the most widely used commercial form of time charter for dry cargo vessels is the so-called "Government Form" approved by the New York Produce Exchange, which provides:

> "6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat at any time of tide, except at such places where it is customary for similar size steamers to safely lie aground." *Poor* on *Charter Parties and Ocean Bills of Lading*, page 265.

2. During World War II, the government chartered practically all the ocean-going tankers and dry-cargo vessels in the American merchant marine under time charters each containing the following provision:

> "Clause 15. Cargo may be laden or discharged in any dock or at any wharf or place that the Charterer or its agents may direct, provided that the Vessel can safely lie afloat at any time of tide." See "Warshiptime, Form 101" (7 Fed. Reg. 3546); "Warshiptime Rev." (9 Fed. Reg. 3773); "Warshipoiltime" (7 Fed. Reg. 6551); "Warshipoiltime (Rev.)" 9 Fed. Reg. 3787. Also see generally Title 46 Code of Federal Regulations, Ch. III, Parts 302 and 303.

3. Likewise during World War II the government prescribed various forms of voyage charters both for tankers and dry-cargo vessels. Some of these forms are still in use by various government agencies, such as General Services Administration and Economic Cooperation Administration.

The government form "Warshipoilvoy", (7 Fed. Register 4386), contains the provision:

> "6. (a) SAFE BERTH. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and secured by the Charterer, any lighterage being at the expense, risk and peril of the Charterer, provided that the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat. * * *"

In the "Warshipvoy, (Revised)" (9 Fed. Reg. 9290) form of voyage charter for dry-cargo vessels, the following provisions appear:

> "4. LOADING BERTH.—a) The cargo described in Part I shall be loaded on the Vessel at such berth or berths that the Charterer may designate, always, however, subject to the approval of the War Shipping Administration. * * *
>
> b) The Charterer warrants that such berth or place as may be designated by him shall be safe in all respects. Unless expressly provided in Part I that the Vessel may load safely aground, the Charterer warrants that such berth or berths shall have sufficient depth of water at all times and stages of tide to accommodate safely a vessel of the size and particulars designated in Part I hereof and that the Vessel can proceed to, remain thereat, and depart therefrom always safely afloat.
>
> * * * * * *
>
> "9. DISCHARGING BERTH.—a) Cargo will be discharged at the berth or berths that the Charterer designates, always subject, however, to the approval of the War Shipping Administration. * * *
>
> * * * * * *
>
> b) The Charterer warrants that such berth or place as may be designated by him shall be safe in all respects. Unless expressly provided in Part I

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that the Vessel may discharge safely aground, the Charterer warrants that such berth or berths shall have sufficient depth of water at all times and stages of tide to accommodate safely a vessel of the size and particulars designated in Part I hereof and that the Vessel can proceed to, remain thereat, and depart therefrom always safely afloat.

* * * * * *

4. The very recent "Time Charter Party—War Risk Revision," issued July 7, 1950 by the Navy for Military Sea Transportation Service of the Department of the Navy under which the Government, has chartered considerably more than a hundred merchant vessels for Korean service, provides as follows:

"(8). The cargo or cargoes shall be laden and discharged in any dock or at any wharf, place or open roadstead that the Charterer may direct, provided the Vessel can lie always safely afloat at any time of tide except at such places where it is customary for similar sized vessels to lie safely aground. * * *"

5. The Americanized Welsh Form (revised August 1939) provides in part:

"1. * * * and being so loaded, shall therewith proceed, with all possible dispatch, to ..... or so near thereunto as she can safely get, and there deliver her cargo alongside any Wharf, and/or Vessel and/or Craft, as ordered, where she can safely deliver, always afloat, * * *."

6. The "FOSFO" Phosphate Charter Party provides in part:

"* * * and shall therewith proceed to ..... as ordered on signing Bills of Lading and there deliver the same, in accordance with the custom of the port, at such wharves, piers or jetties or in such docks or into lighters as may be ordered by the Charterer or its agents or nominees * * *."

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